

The Lady Doun being debtor to the Laird of Grant in £1000 sterling by bond, he pursues the Earl of Sutherland, her late husband, for payment, as vitious in-tromitter with her paraphernalia and other goods, and as being *lucratus* by the marriage; and, on this dependence, arrests the like sum in the Earl of Murray's hands, owing by him to the Earl of Sutherland, as some bygone inlakes of his lady's jointure; and afterwards obtains a decret constituting his debt against Sutherland. Mrs Bouden being a creditor of my Lord Sutherland, in 4000 or 5000 merks, by his clear liquid bond, she likewise arrests in Murray's hands, but posterior to Grant's arrestment. The competition arising which of them were to be preferred, it was contended for Captain Brody, the Laird of Grant's assignee, that he had the first arrestment; and though it was on a dependence, yet, before the competition came to be debated, he had obtained a decret constituting his debt; and his arrestment being a *nexus realis* affecting the subject, his decret must be drawn back to the date of the arrestment; and so must prefer him.

ANSWERED for Mrs Bouden,—Though you are the first arrester, and had your debt constituted before the cause came on to be debated; yet my arrestment, being on a clear liquid bond, must be preferable; because my debt, at the moment of laying on the arrestment, *habebat paratam executionem*, which yours, laid on on a dependance, had not; and the Lords, in parallel cases, had found, that an arrestment laid on for a debt, whereof the term of payment is come, is preferable to a prior arrestment laid on upon a bond, whereof the term of payment was not come; 29th July 1670, *Charteris* against *Neilson*; and 17th July 1678, *Lord Pitmedden* against *Paterson*; and Stair, in his *Institutes*, *tit. Assignations*, extends this, a *paritate rationis*, to the present case, betwixt an arrestment on a dependance and another on a registrate bond. A case in 1704, betwixt my *Lord Prestonhall* and *Drummond of Megginch* was also cited.

The Lords, by a scrimp plurality, preferred the arrestment on the bond to that on the dependance, though prior.

This interlocutor was afterwards altered upon a bill.

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1709. July 20. The EARL of LAUDERDALE *against* the LORD HAY of YESTER.

THE deceased Duke of Lauderdale, and the Earl of Dunfermline, being debtors to —————; there is a comprising led, in 1653, against both their estates; and, in the 1668, the Duke, having transacted the debt, took an assignation to the comprising, in so far as concerned Dunfermline's estate, and a discharge and renunciation *quoad* his own. In 1665 he marries Lady Mary Maitland, his only daughter, to the present Marquis of Tweeddale, then Lord Yester, and disposes to her his whole estate, but under reversion, and redeemable, on payment of £10,000 sterling, in name of tocher, in case of redemption; and which disposition bore a general clause, that, besides the lands generally enumerated, he disposes to her all other lands and rights whatsoever pertaining, or which may be known to pertain or belong to him. Afterwards, in 1676, he uses an order of redemption against his daughter; and, on his paying the foresaid tocher, he obtains a decret of declarator of redemption; and she and

her Lord being charged thereon, in the discussing of a suspension, they are discerned to renounce all benefit of the foresaid disposition, and to accept of the £10,000 sterling in full satisfaction of all. And, accordingly, my Lord and Lady Yester grant a full and ample renunciation in these terms, of the estate of Lauderdale and Swinton, and of all other rights that might pertain to the Duke, and that in favours of the said Duke, her father, and his heirs-male. The present Earl of Lauderdale, as heir to the Duke, his uncle, raises a process against the Lord Yester, as representing his mother, and as lawfully charged to enter heir to her, to denude of the said apprising, in so far as concerned the estate of Dunfermline, thereby apprising in his favours, as heir-male, in implement and prosecution of my Lady his mother's renunciation of all right whatsoever she either had by the disposition or as heir of line to her father.

ALLEGED for the Lord Yester,—That he is not bound to denude, because his mother renounced no more than what was disposed to her; and the last can be no broader than the disposition, its foundation. But *ita est*, the Duke disposed no more in 1665 but what was then in his person; which can never comprehend this comprising of Dunfermline, which the Duke had not then acquired, but only transacted it in the 1668, three years after, and took the conveyance to himself and his heirs whatsoever; and she being his heir of line, and not having renounced it, the same devolves to my Lord Yester, her son, and he is not bound to denude of it.

ANSWERED,—That the Duke's disposition to his daughter was an universal settlement of his whole succession; and though he altered his resolution afterwards, and took it from her by a redemption, and gave her a tocher in lieu of it, yet the renunciation must be interpreted and constructed as universal and large as the settlement; and these words, "all rights which may pertain," is as much as if he had said, "all that shall pertain to me at the time of my decease." And her accepting the tocher in satisfaction clears that she was to retain nothing. Likeas, this apprising was potentially in the Duke's person the time of his disposition to his daughter; for he had then the right of reversion, and the *jus relevi*, or his right of relief against Dunfermline, though he had not the right actually settled in his person till the 1668; yet that is many years before her renunciation, and so must comprehend the same.

The Lords found her renunciation extended to this right; and therefore my Lord Yester behoved to denude of it, in favours of my Lord Lauderdale, as the Duke's heir-male.

But this does not terminate the plea; for the Lords Tweeddale and Yester have rights upon the estate of Dunfermline, which they judge preferable to this comprising, on which they intend to compete and exclude my Lord Lauderdale from reaping any benefit thereby.

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[See the posterior part of this Case, Dictionary, page 12062.]

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1709. *July 22.* ARCHIBALD KINCAID of HOOK *against* OSWALD.

KINCAID and Oswald. Archibald Kincaid of Hook resolving to set a tack of part of his lands; that he might know its extent, he causes one Oswald, a sworn